

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

House Republican Campaign Committee,

Complainant,

vs.

Alliance for a Better Minnesota,

Respondent.

**NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION**

TO: Paul Kohls, Attorney at Law, 8555 Allegheny Circle, Victoria, MN 55386; and Alliance for a Better Minnesota, 1600 University Avenue West, Suite 309, St. Paul, MN 55104.

On February 9, 2010, the House Republican Campaign Committee filed a Campaign Complaint with the Office of Administrative Hearings alleging that the Alliance for a Better Minnesota violated Minnesota Statutes § 211B.06 by preparing and disseminating false campaign material relating to Republican candidates and members of the Minnesota House of Representatives. After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth a *prima facie* violation of Minn. Stat. § 211B.06 with respect to campaign material directed at Republican candidates and members of the Minnesota House of Representatives Kurt Zellers, Marty Seifert and Tom Emmer. This determination is described in more detail in the attached Memorandum.

THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS HEREBY GIVEN that this matter will be scheduled for a telephone prehearing conference and an evidentiary hearing, to be held at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101.

Pursuant to Minn. Stat. § 211B.35, the evidentiary hearing must be held within 90 days of the date the complaint was filed.

You will be notified of the dates and times of both the prehearing conference and evidentiary hearing, and the three judges assigned to hear this matter, within approximately two weeks of the date of this Order. The evidentiary hearing will be conducted pursuant to Minnesota Statutes § 211B.35. Information about the evidentiary hearing procedures and copies of state statutes may be obtained online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the evidentiary hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise prohibited as the

unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judges. Parties should bring with them all evidence bearing on the case with copies for the Administrative Law Judges and the opposing party.

After the evidentiary hearing, the Administrative Law Judges may dismiss the complaint, issue a reprimand, or impose a civil penalty of up to \$5,000. The panel may also refer the complaint to the appropriate county attorney for criminal prosecution. A party aggrieved by the decision of the panel is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63 to 14.69.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at 600 North Robert Street, P.O. Box 64620, St. Paul, MN 55101, or call 651-361-7900 (voice) or 651-361-7878 (TTY).

Dated: February 11, 2010

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

The Minnesota House Republican Campaign Committee (HRCC) is a political and campaign organization whose primary purpose is the promotion and election of Republican candidates to the Minnesota House of Representatives. The Alliance for a Better Minnesota describes itself on its website as an online advocacy and communications organization for progressive groups in Minnesota.

The HRCC alleges that the Alliance for a Better Minnesota intentionally prepared and disseminated false campaign material with respect to Republican members of the Minnesota House of Representatives by alleging they are responsible for reducing the state's renters' credit program. This program provides tax credits to Minnesota renters based on a formula that takes into account a percentage of the rent paid and the renter's income. The campaign material, in the form of advertisements that ran on various websites as well as a website published by the Respondent (returnmyrebate.com), states in various iterations that Tim Pawlenty and his "GOP friends" or "GOP allies" stole or took money from renters by reducing the renters' credit.¹

¹ Complaint Exs. B, C, D, and E.

The size of the credit was reduced from 19 percent to 15 percent when Gov. Pawlenty used the unallotment statute (Minn. Stat. § 16A.152) to set the state budget in July 2009.

One of the advertisements, which states “Tim Pawlenty and His GOP Friends Took Money from Minnesota Renters,” includes a photograph of Republican Representatives Kurt Zellers, Marty Seifert, and Tom Emmer with Governor Pawlenty. Denise Cardinal, a member of Alliance for a Better Minnesota, is quoted as saying, in an interview with Minnesota Public Radio news, that the group targeted these three Representatives because they support the Governor’s action.²

The HRCC maintains that the statements in the advertisements and on Respondent’s website that “GOP allies,” “GOP friends” and individual representatives were responsible for the reduction in the renters’ credit are false because Governor Pawlenty’s decision to use the unallotment statute was made by him alone. According to the Complaint, no decision was made by any Republican member of the Minnesota House of Representatives or any other member of the legislature to reduce the renters’ credit through the unallotment process, and no member of the legislature had the ability or authority to reduce any program through unallotment. Because only the Governor has the authority to reduce programs through unallotment, the Complainant maintains that the Respondent knew its statements with regard to Republican Representatives were false or it communicated those statements with reckless disregard of whether the statements were false.

Minnesota Statutes § 211B.06, subd. 1, prohibits intentional participation:

... [i]n the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact and not against unfavorable deductions or inferences based on fact.³ Moreover, the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.⁴ Finally, expressions of opinion, rhetoric, and figurative language are generally protected speech

² Complaint Ex. A.

³ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

⁴ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

if, in context, the reader would understand that the statement is not a representation of fact.⁵

As noted above, the statute prohibits false statements with respect to “the personal or political character or acts of a candidate.” Statements regarding Governor Pawlenty’s “GOP friends,” “GOP allies,” or simply “allies” are not made with respect to the personal character or acts of any candidate.⁶ Insofar as the Complaint alleges a violation of Minn. Stat. § 211B.06 based on these statements, the Complaint fails to state a *prima facie* violation. Those claims are dismissed.

The advertisement contained in Exhibit B, however, includes a photograph of Representatives Zellers, Seifert and Emmer, along with a statement that Gov. Pawlenty and his “GOP Friends” took money from renters. The inclusion of the photographs of these representatives does amount to a statement that these three candidates were responsible in some way for the reduction in the renter’s credit.

To allege a *prima facie* violation, the Complainant must allege sufficient facts to show that a violation of law has occurred.⁷ “Prima facie” means “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.”⁸ “Prima facie evidence” is “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.”⁹ In determining whether a campaign complaint sets forth a *prima facie* violation of the statute, the Administrative Law Judge is required to credit as true all of the facts that are alleged in the Complaint, provided that those facts are not patently false or inherently incredible.

The Complaint alleges that these individual representatives were not responsible for the reduction in the renter’s credit program. The Respondent apparently included these individuals in the advertisement based on its belief that they supported the Governor’s action. The Administrative Law Judge concludes that the Complaint alleges sufficient facts to support a *prima facie* violation of Minn. Stat. § 211B.06 with regard to the advertisement in Exhibit B.

To prove a violation at the hearing, the Complainant must show that the statement is substantively false and that the person or persons who prepared, disseminated or broadcasted the advertisement did so knowing it was false or communicated it with reckless disregard of whether it was false. The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.¹⁰ Based on this standard, the Complainant has the burden to prove by clear and convincing evidence that the Respondent

⁵ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), *citing Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996);

⁶ Complaint Exs. C, D, and E.

⁷ Minn. Stat. § 211B.32, subd. 3.

⁸ *Black’s Law Dictionary* 1228 (8th ed. 2004).

⁹ *Id.* at 598.

¹⁰ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

prepared or disseminated the statement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondent “in fact entertained serious doubts” as to the truth of the ad or acted “with a high degree of awareness” of its probable falsity.¹¹

This matter will proceed to an evidentiary hearing before a three-judge panel to be scheduled in the near future.

K.D.S.

¹¹ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), rev. denied (Minn. 2006).